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BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

Order Instituting Investigation on the Commission's Own Motion into the Rates, Operations, Practices, Services and Facilities of Southern California Edison Company and San Diego Gas and Electric Company Associated with the San Onofre Nuclear Generating Station Units 2 and 3.	Investigation 12-10-013 (Filed October 25, 2012)
And Related Matters.	Application 13-01-016 Application 13-03-005 Application 13-03-013 Application 13-03-014

RESPONSE OF SOUTHERN CALIFORNIA EDISON COMPANY (U 338-E) TO THE MOTION OF THE OFFICE OF RATEPAYER ADVOCATES

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Dated: May 13, 2015

Pursuant to Rule 11.1(e) of the Rules of Practice and Procedure ("Rules") of the California Public Utilities Commission ("Commission"), Southern California Edison Company ("SCE") responds to the Motion Of The Office of Ratepayer Advocates ("ORA") For An Interim Ban On Communications Between Southern California Edison Company And The California Public Utilities Commission Regarding The San Onofre Nuclear Generating Station Order Instituting Investigation ("Motion"). The Motion should be denied; alternatively, the Commission should impose the same communications restrictions on all parties.

I. INTRODUCTION

ORA's motion asserts that SCE's April 29, 2015, Filing[1] indicates that SCE "may" have violated the Commission's ex parte rules on a number of occasions.[2] Without even attempting to support that assertion – an assertion that SCE vigorously disputes – ORA proposes that SCE be prohibited from engaging in communications with CPUC decisionmakers and Division Directors.[3] In other words, ORA proposes to ban SCE from engaging in communications that are indisputably permitted under the Commission's ex parte rules. ORA justifies this request on the grounds that "SCE's apparent interpretations of the *ex parte* rules may endanger the due process rights of other parties."[4] ORA fails to explain, however, how prohibiting one party from engaging in communications allowed by the rules, while permitting all other parties to engage in such communications, would be consistent with due process or fundamental fairness.

[1] Southern California Edison Company's Response to Administrative Law Judges' Ruling (filed Apr. 29, 2015) ("April 29 Filing").

[2] ORA Motion, p. 2.

[3] ORA would except "written communications copied simultaneously to all parties in this proceeding or on-the-record hearings." *Id*. pp. 1-2.

[4] *Id.* p. 2.

SCE respectfully submits that ORA's motion should be denied. SCE remains subject to the Commission's ex parte rules, as are all other parties, and SCE fully intends to comply with those rules. If, however, the Commission is inclined to restrict ex parte communications in this proceeding, it should apply those restrictions equally to all. Moreover, any restriction should exclude procedural communications (at least those directed to the Administrative Law Judges ("ALJs")), and noticed ex parte communications. Finally, any restriction should clarify the subject matter of restricted communications.

II. ORA HAS NOT JUSTIFIED RESTRICTING SCE'S COMMUNICATIONS

ORA's motion is based on its concern that "SCE is not applying correct standards in its application of the *ex parte* reporting requirements."[5] ORA's motion, however, identifies only one interpretation of the rules with which it disagrees: ORA claims that SCE should have filed ex parte notices with respect to communications that were exclusively from a decisionmaker to SCE.[6] ORA's position is incorrect and does not justify the relief it seeks.

Rule 8.4 governs the reporting of ex parte communications. The rule states that the notice "shall include the following," and lists three categories of information.[7] The third category is a "description of the interested person's, but not the decisionmaker's (or Commissioner's personal advisor's), [1] communication and [2] its content."[8] As SCE has previously explained,[9] this language prohibits the party from disclosing in the notice either (1)

[5] *Id*., p. 5.

[6] *Id.* p. 4.

[7] Rule 8.4.

[8] Rule 8.4 (c) (brackets added).

[9] SCE Response to the Motion of the Alliance for Nuclear Responsibility (filed Feb. 25, 2015), p. 8.

the fact that the decisionmaker engaged in a substantive communication, or (2) the "content" of that communication.[10]

ORA's request that the Commission "clarify" that Rule 8.4 requires a party to report the date, time, and location of the communication, and also the identities of each decisionmaker involved, even if the party does not engage in a substantive communication,[11] is not a "clarification" at all; it would amount to rewriting that rule. Such a notice would necessarily disclose the fact that the decisionmaker engaged in a substantive communication, which Rule 8.4(c) states shall not be disclosed.[12]

As ORA implicitly acknowledges by asking the Commission to "clarify" the ex parte reporting requirements, the rule as currently written does not require or permit an ex parte notice to be filed when the only substantive communication is from the decisionmaker to the party, and it has not been the practice of parties appearing before the Commission (presumably including ORA) to file notices in these situations. For example, an ALJ who had recently served as the Commission's Acting Chief ALJ testified to the Senate Committee on Energy, Utilities and Communications: "if a Commissioner speaks to a party, but the party doesn't say anything back, that is technically not considered a reportable ex parte contact under the current rules."[13]

ORA implies that SCE prompted CPUC decisionmakers to engage in one-way communications, suggesting that one-way communications reflect a "strategy" and that the

[10] Rule 8.4(c).

[11] ORA Motion, p. 4.

[12] In addition, Rule 8.4 requires the notice to include each of the three specified categories of information. When the only substantive communication was from the decisionmaker to the party, the third category cannot be disclosed in the notice, thus further supporting the long-standing, practical construction of the rules that an ex parte notice need not be provided in these circumstances.

[13] Thom Decl. Ex. A (attaching transcription of testimony of David Gamson to Senate Committee on Energy, Utilities and Communications on March 11, 2015).

concept "appears to be having a CPUC decisionmaker speak," without the party providing responses.[14] There is no basis for this suggestion. The one-way communications regarding SONGS described in Appendix C to SCE's April 29 Filing were not invited by SCE.[15]

ORA erroneously asserts that filing an ex parte notice for a one-way communication would enable other parties to seek equal time meetings.[16] As SCE has previously explained,[17] Rule 8.3(c)(2) entitles a party to an equal time meeting only when the decisionmaker "grants" an ex parte meeting. Read in context, the rule makes clear that a decisionmaker "grants" a meeting only in response to a party's "request" for a meeting. When a party does not request a meeting, but instead the communication is initiated by the decisionmaker, there has been no "grant" of a meeting within the meaning of the equal time rule. As such, equal time would not be awarded where the underlying communication was itself neither sought nor requested by a party.

ORA's request is essentially that the Commission modify Rule 8.4 to require one-way communications to be reported. Whatever the merits of that position, the Commission should consider it, as appropriate, in a generic proceeding to evaluate changes to the ex parte rules. Moreover, even if ORA's position were accepted, the result would only be that one-way communications would be reported, not eliminated. ORA's position does not justify prohibiting such communications, and certainly does not justify singling out SCE as the only party who

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[14] ORA Motion, p. 3.

[15] As described in Mr. Pickett's declaration (Appendix F to SCE's April 29, 2015, filing), in the March 26, 2013, meeting, Mr. Pickett provided an update on the status of SCE's efforts to restart SONGS. This report led President Peevey to express concerns about the possibility of shutting down SONGS, which in turn led him to express views on how to resolve the cost issues. Pickett Decl. ¶¶ 5-7. Mr. Pickett states, however, that he did not expect to discuss a settlement or other resolution of the OII with President Peevey. *Id.* ¶ 3.

[16] ORA Motion, p. 4.

[17] SCE Response to the Motion of the Alliance for Nuclear Responsibility (filed Feb. 25, 2015), p. 9.

would be prohibited from listening when a decisionmaker communicates, which is apparently what ORA's motion seeks.[18]

ORA's motion also fails to explain why any of the other communications described in Appendix C to SCE's April 29 Filing constitute reportable ex parte communications,[19] let alone why they justify prohibiting SCE alone from engaging in communications permitted by the ex parte rules. Singling out SCE for a unique ban on ex parte communications based solely on ORA's vaguely-stated belief that SCE "may" have engaged in unspecified violations of the ex parte rules[20] would itself violate due process.

ORA's reliance on the ruling in the cited Pacific Gas & Electric ("PG&E") case is misplaced.[21] In that case, PG&E admitted that it violated Rule 8.2(c)(2) by failing to provide a three-day notice for meetings with Commissioners after the Commission issued a proposed decision. The ruling considered and rejected imposing an ex parte ban for the duration of the proceeding. Instead, the ruling imposed an interim ex parte ban, applicable to "*every Interested Person*."[22] The ALJ lifted the ex parte ban three weeks later.[23] ORA's motion goes well beyond

[18] The Utility Reform Network ("TURN") interprets ORA's motion to seek an order requiring SCE to "report certain details" regarding one-way communications. TURN's Response To ORA's Motion (filed May 12, 2015), p. 1. ORA's motion does not seek such a ruling, but in any case, any such requirement should be applied to all parties.

[19] SCE has acknowledged that Mr. Pickett's reaction to President Peevey's remarks in the March 26, 2013, meeting may have crossed into a substantive communication.

[20] ORA Motion, p. 2.

[21] ORA Motion, p. 3 (citing A.06-11-005, Joint Ruling of the Assigned Commissioner and the President Officer Modifying the Scoping Memo (filed June 1, 2007) ("PG&E Ruling"), pp. 4-5).

[22] PG&E Ruling, p. 5, Ordering Paragraph 2 (emphasis added). The ruling created an exception for equal time meetings in response to PG&E ex parte communications. *Id.* p. 6, Ordering Paragraph 3.

[23] A.06-11-005, Administrative Law Judge's Ruling Lifting the Ex Parte Restrictions On the New Year's Storms (filed June 22, 2007). Subsequently, it was ruled that PG&E had committed five ex parte violations, that a penalty should not be imposed, and that the Commission should require PG&E to develop revised compliance procedures for the ex parte rules. A.06-11-005, Assigned Commissioner and Administrative Law Judge's Ruling On Sanctions For Ex Parte Violations (filed Aug. 8, 2007).

the PG&E ruling by asking for a communications ban on SCE alone. In addition, the factual predicate for the ruling in the PG&E case is missing here: in the PG&E case, PG&E admitted that it violated the ex parte rules, whereas SCE disputes, and the Commission has not found, that any of the communications described in Appendix C to its April 29 Filing were reportable under the rules.[24]

III. ANY RESTRICTIONS SHOULD APPLY EQUALLY TO ALL PARTIES

If the Commission were inclined to follow ORA's recommendation, then it should apply any restrictions equally to all parties, as it did in the PG&E ruling that ORA cites. ORA does not attempt to justify its proposal as a punishment of SCE (which would be wholly inappropriate, especially in the absence of any finding that SCE has violated the rules), but instead as a means of preserving due process and fairness for all parties. This rationale does not support a restriction applicable to SCE alone. Instead, if the Commission is persuaded that it would be fair to impose additional restrictions, those restrictions should apply equally to all parties.

In addition, the Commission should craft any restrictions to ensure that they are clear and that they allow communications that would raise none of the concerns claimed by ORA. For example, all parties should be permitted to engage in procedural communications (at least those directed to the ALJs).[25] Likewise, there is no reason to preclude noticed ex parte communications.[26] Finally, if the Commission adopts a restriction, it should clarify the subject

[24] For the same reason, TURN's reliance on the ex parte ban imposed in A.13-12-012/I.14-06-016 is misplaced. TURN's Response To ORA's Motion (filed May 12, 2015), p. 1. As TURN acknowledges, however, the Commission imposed that remedy on PG&E only after a proceeding in which it found that PG&E had violated the rules. *See* D.14-11-041. The Commission has made no such finding in this case.

[25] *See* Rule 8.1(c) (defining ex parte communication as a communication that concerns a substantive issue in a proceeding, and as excluding procedural inquiries).

[26] *See* Rules 8.3(c)(2) (permitting individual oral communications with three-day advance notice); Rule 8.4 (reporting requirements).

matter of restricted communications. The Commission has approved the settlement of the OII and associated ratemaking issues,[27] and has kept this proceeding open for the limited purpose of consideration and potential prosecution of possible Rule 1.1 violations (including the Alliance for Nuclear Responsibility's motion for sanctions).[28] As a result, SCE believes that the subject matters of potential ex parte communications that would be restricted going forward in this proceeding are limited to (1) whether SCE violated the ex parte rules, and if so, the appropriate penalty, (2) whether any other party violated Rule 1.1, (3) the Alliance for Nuclear Responsibility's Petition for Modification, and (4) the application for rehearing of Ruth Henricks and the Coalition to Decommission San Onofre. Other issues pertaining to SONGS, such as decommissioning, are not within the scope of this proceeding, and communications on those subjects should not be restricted in this proceeding.[29] In any case, the Commission should clearly and specifically delineate the subject matter of communications that would be restricted if it entertains ORA's request.

IV. CONCLUSION

The Commission should deny ORA's Motion. In the alternative, the Commission should apply any restriction on communications equally to all parties, and (1) should not prohibit procedural communications (at least to the ALJs), (2) should not prohibit noticed ex parte communications, and (3) should clarify the subject matter of any restrictions on communications.

[27] D.14-11-040.

[28] D.15-03-043, p. 2.

[29] To the extent such communications are within the scope of other proceedings, they would be subject to any applicable requirements of the ex parte rules in the context of those proceedings.

Date: May 13, 2015

Respectfully Submitted,

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Attachment

Declaration of Debra Thom

DECLARATION OF DEBRA THOM

I, Debra Thom, do hereby declare as follows:

1. I am employed at the law firm, Munger, Tolles & Olson LLP as a word processor.

2. I listened to an audio recording, converted from a video recording (located at http://www.digitaldemocracy.org/hearing/83?startTime=731&vid=KFPGF5cSaEI), of the testimony provided by David Gamson, an Administrative Law Judge of the California Public Utilities Commission, at the Senate Committee on Energy, Utilities and Communications Oversight Hearing that took place on March 11, 2015.

3. I created a transcription of that testimony, a true and accurate copy of which is attached to my declaration as **Exhibit A**.

I declare under penalty of perjury that the foregoing is true and correct.

Executed at Los Angeles, California on May 13, 2015.

Debra Thom

Exhibit A

David Gamson Transcription 12:05 – 24:16

David Gamson Good morning Mr. Chairman and Senators, my name is David Gamson and I'm an Administrative Law Judge of the California Public Utilities Commission. Recently I was the acting Chief Judge while Chief Judge Karen Clapton was on another assignment at the commission. Over the past 28 years I have also been an analyst, a personal advisor to two commissioners and a consultant to Senator Herschel Rosenthal when he chaired this committee in the 1990s. As background, the Commission's decision making process generally involves a formal proceeding before an administrative law judge or ALJ. The 40 ALJs at the CPUC are all trained at the National Judicial College. The job of the ALJs' is to provide a fair public decision making process. We develop the record, ensure due process, and write a timely independent and impartial proposed decision which in some cases is called a presiding officer's decision or POD on each issue. All proposed decisions must by law be based solely on the record of the proceeding. Commission proceedings last from a few months to a year or more, depending on the complexity and controversy of issues. Once an ALJ publishes a proposed decision it is available for public comment for 30 days. Any of the 5 commissioners may also draft what's called an alternate decision which must also be based on the record or the proceeding and be available for public comment. After reviewing the public comment and considering modifications to a proposed or alternate decision the commissioners may vote in a public meeting. In order to conduct the Commission's business there must be communication with the public, parties and related entities. These communications fall into three general categories, first, are official filings and communications which are in the formal public record, second are regular business communications and information gathering by staff, and third, are what are essentially lobbying efforts to influence Commission decisions. It is this third category which is known as *ex parte* contacts. I have a short presentation on the rules for *ex parte* contacts as you mention. Now, I will emphasize up front here that ALJs do not engage in these one sided ex parte contacts. You mentioned the 65,000 emails that were released by PG&E, a Commission administrative law judge did order the release of those 65,000 emails and they actually fall into all of the 3 categories that I mentioned. It's actually a fairly small percentage that fall under the *ex parte* rules, most of them are actually official filings and communications or regular business communications, but some of them were *ex parte* communications and some of those were improper *ex parte* communications. The commission did initiate a proceeding, initiated by an administrative law judge to penalize PG&E for those improper communications. The Commission did fine PG&E $1.1 million and banned PG&E from lobbying for 1 year. So I have a presentation, has this been handed out to Senators? Ok, thank you.

First I wanted to let you know the definition of an *ex parte* contact and Senator I think you actually mentioned it fairly clearly but let me read it any

way.

This is from the Statute Public Utilities Code § 1701.1: "[A]ny oral or written communication between the decision maker and a person with an interest in the matter before the Commission concerning substantive but not procedural issues that does not occur in a public hearing, workshop, or other public proceeding, or on the official record of the proceeding on the matter." Several of the terms that are in that definition are actually specifically defined, a person interest, substantive, public hearing, these are all defined terms in the Commission's rules. The rules in general are set forth in the statute SB 960 from 1996 is the main statute that set forth the rules. Public Utilities Code 1701.1 through 1701.3 and then Article 8 of the Commission's Rules of Practice and Procedure implements the statutory rules. I have a little visual here, this is the Rules of Practice and Procedure of the Commission, it is 17 chapters long and Chapter 8 is the chapter on *ex parte* rules. Some of the *ex parte* rules apply to all proceedings for example Rule 8.3(f) is the no judge shopping rule, and this rule has come into play recently with some of the revelations with PG&E. Basically, *ex parte* communications regarding the assignment of an Administrative Law Judge are strictly prohibited in all circumstances. That is the rule and we've had some controversy about that rule of late. Secondly, *ex parte* rules apply from the very beginning of a proceeding until the final resolution of a proceeding, which includes the rehearing portion of a proceeding. Third, decisions must be based on the record of a proceeding and *ex parte* contacts are explicitly not in the record of the proceeding, that's Rule 8.3(k). Now we do have 3 categories of proceedings at the Commission all of which are defined by statute. The first category is called Quasi Legislative Proceedings, these are broad policy rule making proceedings that involve statewide or industrywide rules and policies, for example, the electric industry or the telecommunications industry and in these proceedings § 1701.4(b) has no restrictions or reporting of *ex parte* communications. These are essentially the same rules that the legislature has, which is that not all lobbying is allowed without reporting. The second category is called adjudicatory, adjudicatory proceedings are investigations or complaint proceedings. The San Bruno proceeding which you mentioned is an adjudicatory proceeding and there is an absolute ban on *ex parte* communications in adjudicatory proceedings, per §1701.2(b). And the third category is the more complicated proceeding category which is the Rate Setting category. Rate Setting proceedings are pretty much everything else that the Commission does. And they might be general rate cases, they might be questions having to do with GHG, credits and how to distribute them, public purpose programs, service changes, wide variety of types of programs that the commission regulates. I would say that the majority of the proceedings before the Commission are rate setting proceedings. And there is a set of detailed restrictions and reporting requirements regarding *ex parte* contacts. So the specific requirements in rate setting proceedings are the following: All party meetings with commissioners are permitted. So, this is

where every party is invited to a meeting with a Commissioner, there has to be 3 days advance notice to parties of this meeting and all can attend. That's section 1701.3(c). Also in 1701.3(c), individual oral communications with commissioners, so that would be single party meetings with commissioners are also permitted. However, there also has to be three days advance notice given to parties, and all parties who are not at that original meeting are given an equal time opportunity. So if party A meets for twenty minutes, every other party has the opportunity to also meet for twenty minutes. And third, personal advisors to Commissioners which would be like your committee consultants, *ex parte* communications with those personal advisors are allowed, they must be disclosed after the fact within three days, but the advance notice and equal time opportunity requirements do not apply. Now there are specific reporting requirements for these *ex parte* contacts, and I should note that the reporting requirements are on the party, so the Commissioner, the decision-maker, does not report the *ex parte* contact under the rules. It is actually the party who has the *ex parte* contact, who does the reporting. So all oral and written communications must be filed within three days per section 1701.3(c). Written communications must be served to all parties to the proceeding on the same day that they're given to the decision-maker. As I mentioned, the obligation to report is on the interested person or party regardless of who initiated the contact. But according to Rule 8.4(c) and also in the code, the reporting shall not include statements of the Commissioner or advisor. So in certain circumstances, if a Commissioner speaks to a party, but the party doesn't say anything back, that is technically not considered a reportable *ex parte* contact under the current rules.

Okay. Jack? Can I have that other version please? I appear to have an old version of the presentation here.

So finally what I wanted to mention was a couple of recent CPUC reform efforts that have that have been undertaken. First the Commission has, through an Executive Director memo of October 8th, 2014, developed something called a contact log, so even though the Commissioners and the advisers do not have a requirement to report *ex parte* contacts under the law or the Commission rules, the Executive Director did ask the Commissioners, the advisers, and upper management of the Commission to report all substantive communications with regulated entities in rate-setting or adjudicatory proceedings. And these contacts are available on the Commission's website. Secondly, per the Commission decision 1411041, PG&E must now report contacts with all high-level Commission staff. So, these persons are not covered by the *ex parte* rules. PG&E does have a one-year ban on ex parte communications with covered personnel, but beyond that it also must report its contacts with high-level Commission staff, and that's public. And third, we have hired a consultant, Michael Strumwasser, who is doing a report on *ex parte* and is going to come out with some recommendations for reforms to *ex parte* rules, and that report is not yet

available, but it should be forthcoming fairly soon. Thank you and I'll take any questions.